SUPREME COURT, U. S.

DEC 30 1969

JOHN F. DAVIS, CLERK

No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHEMICAL LEAMAN TANK LINES, INC., ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
HOWARD E. SHAPIRO,
GEORGE EDELSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
Acting General Counsel,
JEROME R. SHARPMAN,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 880

CHEMICAL LEAMAN TANK LINES, INC., ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from final judgments of a three-judge district court (J.S. 1a-6a) dismissing, after consolidation, two suits brought to set aside two orders of the Interstate Commerce Commission entered in separate proceedings which permitted a motor carrier to shift by less than a mile the point at which it interlines shipments.

372-944—69

The carrier is Bell Transport Company ("Bell"). In the first order (issued February 7, 1966) Bell received permission under the Commission's Deviation Rules[1] to interline shipments of explosive and other inherently dangerous commodities at its Longview, Texas, terminal, less than a mile from the previously authorized point at the plant site of the Texas Eastman Company (J.S. 7a–12a). In the second order (dated April 7, 1967) the Commission, after notice and hearing, granted Bell a certificate authorizing the relocation at the Longview terminal of all of Bell's interline and tacking[2] operations on all previously authorized commodities (J.S. 14a–44a). The latter authority encompasses the dangerous commodity authority and is expressly restricted to the identical operations that Bell had previously conducted at the Texas Eastman plant site (J.S. 38a–39a).

Beginning in August, 1963, Bell, with the full knowledge, consent and approval of Texas Eastman, had interchanged a substantial amount of traffic with

[1] The pertinent Rule provides (49 C.F.R. 1042.1(c)(7)(iii)(a)): "Common carriers of explosives and other dangerous articles operating over either regular or irregular routes, or both, may in the interest of safety interchange shipments or equipment or combine routes or operating rights at any place within ten miles of any place where interchange or joinder is permissible under the existing authorities of the carrier or carriers involved."

"'Interlining' is the practice whereby a carrier, whose certificated routes do not reach the shipment destination, transfers the shipment to another carrier for delivery. 'Interchanging' is a form of interlining whereby the two interlining carriers switch trailers at the point of transfer." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 121 n. 2.

[2] Tacking is the combining by a single carrier of two separate grants of authority at a common point.

other carriers at the Texas Eastman plant site (J.S. 17a, 23a); Bell also had used the site, with Texas Eastman's tacit consent, to tack its operating authorities (J.S. 17a–18a, 21a). Bell filed its notice of deviation with the Commission on November 26, 1965 (J.S. 7a, 22a). A week later, Texas Eastman withdrew its consent to use of its site for interlining and tacking, but on January 12, 1966, Texas Eastman deferred the withdrawal of consent (J.S. 21a). On February 7, 1966, the Commission approved the deviation, but only with respect to explosive and other inherently dangerous commodities (J.S. 7a–8a). Anticipating Texas Eastman's ultimate withdrawal of consent (which became effective on April 1, 1966 (J.S. 21a, 34a, 35a)),[1] Bell filed its relocation application on February 17, 1966 (J.S. 14a). After a hearing and a report and recommended order by the hearing examiner (J.S. 13a–37a), the Commission granted the relocation authority (J.S. 38a–42a) and denied reconsideration (J.S. 43a–44a).

On appeal, the three-judge district court, in a *per curiam* opinion, unanimously upheld both Commission orders. The court found that the orders were supported by substantial evidence and that the Commission's action in the two proceedings "was not arbitrary, capricious, or in violation of any rule of law, and did not impinge upon any vested right of any plaintiff here" (J.S. 3a).

[1] Texas Eastman's action was induced by a competitor of Bell (J.S. 22a), which later opposed Bell before the Commission in both the deviation and relocation proceedings (J.S. 7a, 16a).

ARGUMENT

This appeal amounts simply to an attack upon the Commission's determination that the present and future public convenience and necessity require the continuation of Bell's services by permitting it to make a relatively slight shift in its interline and tacking point. The questions raised are insubstantial and were correctly disposed of below.

Since the parties admitted below (J.S. 2a) and appellants concede here (J.S. 20) that affirmance of the Commission's relocation order would moot the issues raised in the deviation proceeding, we shall discuss the relocation proceeding first.

1. The relocation proceeding

There is no merit to appellants' complaint (J.S. 20–26) that the Commission failed to apply the criteria required by 49 U.S.C. 307 in granting Bell authority to relocate its interline and tacking point. Bell did not seek to perform a new or different operation or to render service which would change, in any way, the posture of existing competition. It merely sought authority to continue an operation which the public had used, but which would have been terminated by withdrawal of Texas Eastman's consent to interline or tack at its plant site. To justify a finding that public convenience and necessity required a grant of authority in these circumstances, the Commission determined that Bell need only show operating economies and efficiencies beneficial to the carrier which could be passed on to shippers and that the proposed service through the new gateway or interchange point

would not result in a competitively different service than had been performed (J.S. 29a–30a). See *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760–761 (E.D. Va.), affirmed *per curiam*, 340 U.S. 802; *Interstate Common Carrier Council of Md.* v. *United States*, 84 F. Supp. 414 (D. Md.), affirmed *per curiam*, 338 U.S. 843. Since Bell had previously carried a substantial amount of traffic through the plant site (J.S. 23a), the Commission properly found that the evidence satisfied these criteria (J.S. 29a–30a).[5]

2. The deviation proceeding

Even if the Commission's relocation order were held invalid, this would not affect the validity of the Commission's deviation order limited to dangerous commodities.

Appellants urge (J.S. 13–15, 19–20) that the Commission's order in the deviation proceeding was arbitrary and capricious because in actuality it resulted in the grant of new certificate authority or a right to a permanent deviation in violation of 49 U.S.C. 308 (b). This argument is based upon the premise that Bell lacked the requisite permission from Texas Eastman to validate the prior operations at the plant site

[5] As to appellants' argument (J.S. 22–23, 30–31) that a taint of unlawfulness in some of Bell's operations should have precluded the Commission from considering them, the Commission adopted the examiner's finding that the irregularities in Bell's past operations were "not of such magnitude * * * as to require a finding that applicant is unfit to conduct operations through the relocated gateway" (J.S. 30a).

upon which the order was based. The record shows, however, that Bell had unrestricted permission to interchange and tack authority at Texas Eastman's plant site prior to the filing of the notice of deviation (J.S. 7a, 21a, 34a, 35a). Moreover, the grant of authority to deviate was not "permanent," but was good only "so long as service is continued" at the plant site (J.S. 8a).

Appellants also claim (J.S. 15–18) that the Commission's deviation order is fatally defective because it was not based upon adequate investigation or hearings. *Greyhound Corporation* v. *United States*, 221 F. Supp. 440 (N.D. Ill.), upon which appellants rely, is, however, inapposite since here there were no material questions of fact which required hearings or further investigation, as there were in *Greyhound* (221 F. Supp. at 443, 444–445). There is no real dispute that (1) the point of deviation is within 10 miles of the plant site, (2) safety would be served by relocating the point of interlining shipments of dangerous commodities from the shipper's plant to Bell's truck terminal, and (3) Texas Eastman's consent to Bell's interlining at the plant site continued until after Bell received approval to deviate. The criteria established by the Commission's deviation Rule (n. 1, *supra*) were therefore met, and the Commission was justified in rendering its decision upon the pleadings. Cf. *Riss & Co.* v. *United States*, 117 F. Supp. 296 (W.D. Mo.), affirmed *per curiam*, 346 U.S. 890.

There was no defect in the Commission's failure to list the explosive or dangerous commodities covered by the deviation order. The Code of Federal Reg-

ulations contains a list of such commodities with detailed definitions which furnish sufficient guidance for application of the Commission's order. See 49 C.F.R. Parts 171–179, particularly Section 172.5 and Part 173. There was no need to restate this list in the deviation order.

CONCLUSION

For the foregoing reasons the judgments of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
GEORGE EDELSTEIN,
Attorneys.

FRITZ R. KAHN,
Acting General Counsel,
JEROME E. SHARFMAN,
Attorney,
Interstate Commerce Commission.

DECEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE 1969